

## The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ALYSON HERFERT, TALANA WILEY, )  
SHANNON GORDNER, KATHRYN DE )  
PEUTER, BECKY KUHL, ALANNA )  
WASKO, and DENIZ ZOELLER, on behalf of ) No. 2:11-cv-1301-JCC  
themselves and all others similarly situated, )  
Plaintiffs, ) JOINT OPPOSITION TO OBJECTOR  
v. ) PEDERSON'S MOTION TO STAY  
CRAYOLA LLC, ) POSTING OF APPEAL BOND AND  
Defendant. ) RELATED DISCOVERY  
NOTE ON MOTION CALENDAR:  
AUGUST 24, 2012

## I. INTRODUCTION

Objector Amber Pederson’s Motion to Stay Posting of Appeal Bond (Dkt. 68) is based on a misreading of this Court’s reasoning when it set the amount of the appeal bond. The Objector concedes that a bond of up to \$3,000 would be justified (Dkt. 68 at 4). Objector argues, however, that the bond amount is improper because it is based “on an inclusion of attorneys’ fees for the appellees.” (Dkt. 68 at 3). But the Court did not only consider attorney’s fees in setting the bond amount, relying instead on the factors routinely used by courts in this Circuit. *See* Tr. of July 31, 2012, Hearing at 6:2-9 (Court explaining factors relied on in determining bond amount). Because

1 the factors this Court employed are well-accepted in this Circuit, any review of the amount of the  
 2 bond would be for abuse of discretion. This Court, applying well-accepted factors, used its  
 3 discretion to set a bond of \$20,000. Given the deferential standard of review and the Court's  
 4 careful analysis, Objector is unlikely to prevail on appeal. The stay should be denied.<sup>1</sup>

## 5 II. ARGUMENT

6 Federal Rule of Appellate Procedure 7 provides that "the district court may require an  
 7 appellant to file a bond or provide other security in any form and amount necessary to ensure  
 8 payment of costs on appeal." Fed. R. App. 7. The Advisory Committee Notes to the Rule  
 9 indicate that it leaves "the question of the need for a bond for costs and its amount in the  
 10 discretion of the [district] court." Fed. R. App. 7, Adv. Comm. Notes. *Accord Azizian v.*  
 11 *Federated Dep't Stores, Inc.*, 499 F.3d 950, 955 (9th Cir. 2007) (stating that the amount of bond  
 12 is reviewed on appeal for abuse of discretion).

13 Courts in the Ninth Circuit look to four factors to determine whether a bond is necessary  
 14 and the amount of the bond: (1) the merits of the appeal; (2) whether the appellant has shown any  
 15 bad faith or vexatious conduct; (3) the appellants' financial ability to post a bond; and (4) the risk  
 16 that the appellant will not pay the appellees' costs of an unsuccessful appeal. *In re Wells Fargo*  
 17 *Loan Processor Overtime Pay Litig.*, No. 07-1841, 2011 WL 3352460, at \*10 (N.D. Cal. Aug. 2,  
 18 2011) (applying factors and setting bond at \$20,000 if objector were to appeal).

19 This Court analyzed these factors in setting the bond amount; the Court never mentioned  
 20 attorney's fees. Dkts. 67 & 71 (Minute Order on appeal bond); Dkt. 70 (notice of filing of  
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 25<sup>1</sup> This Court may also deny the Motion to Stay because, after Darrell Palmer's pro hac vice application was revoked,  
 26 there is no valid signature on that motion. See Dkt. 68 at 7 (listing Palmer as sole signatory) and Fed. R. Civ. P.  
 11(a) (the "court must strike an unsigned paper unless the omission is promptly corrected after being called to the  
 attorney's or party's attention").

1 Official Transcript); Tr. of July 31 Hearing at 6:2-9. “After considering the factors that are  
 2 suggested by the Ninth Circuit,” this Court found on the record that:

- 3     • “Ms. Pederson is the only objector out of millions of claimants”
- 4     • “the appeal appears to be vexatious and frivolous”
- 5     • “there is a serious risk that Ms. Pederson will not be available to pay any costs in
- 6                 the event she loses an appeal,” and
- 7     • “the apparent ability of her attorney to post bond” favors the \$20,000 amount.

8 Tr. of Jul 31 Hearing at 6:2-9.<sup>2</sup> These findings are plainly supported by the record.

9                 First, Objector Pederson is, as the Court found, the only objector, although millions of  
 10 units of Washable Colored Bubbles were distributed.

11                 Second, the appeal is vexatious and frivolous. After all, what more could Objector  
 12 Pederson want from the Settlement in which her claim is valued at *most* \$15, *Id.* at 5: 15-20, and  
 13 which already provides for money back; compensation for any property damage; review of  
 14 claims by a neutral third party in the event of a claimant’s dissatisfaction; and changes to the  
 15 product and marketing to protect consumers? Moreover, there is no limit to the number of  
 16 claimants who can take advantage of these benefits. Despite this extraordinary relief, Class  
 17 Counsel’s attorney’s fees are less than their lodestar.

18                 In contrast, Courts have routinely found that Objector’s counsel have laid in wait for  
 19 large class action settlements to be approved, then suddenly appear on behalf of “pro se”  
 20 objectors at the appeal stage, hoping that the parties will buy them off to allow the settlement to  
 21 go forward without the delay of appeal. *See* Ex. 3 to Dkt. 57 (detailing abandoned appeals,

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22                 <sup>2</sup> Mr. Palmer has not indicated he will withdraw as counsel for the appeal in the Ninth Circuit, and thus his ability to  
 23 pay is still relevant.

1 frivolous appeals, and high bond amounts required of Objector's counsel) and Ex. 1 to Dkt. 62  
 2 (same). This appeal, like so many others pursued by Objector's counsel, appears vexatious and  
 3 frivolous.

4       Third, as Objector Pederson conceded in her Opposition to the Motion for Appeals Bond  
 5 (Dkt. 60 at 3), there is a serious risk that Objector Pederson will not pay costs. Not only is she  
 6 from another district, but her counsel's lack of candor (including in his pro hac vice application)  
 7 is further cause for concern that costs will not be paid. *See* Dkt. 74 (denying application of  
 8 Darrell Palmer for admission pro hac vice). The parties also note the unanswered question of  
 9 whether the objector was really pro se at the time of her original objection or whether she was  
 10 always represented by Mr. Bandas (one of the three law firms that now represent her).

12       Finally, Objector cites to no authority that a court may not consider the ability of counsel  
 13 to post bond. Indeed, courts in this circuit have considered the ability of counsel to post the  
 14 appeal bond. *See In re Wal-Mart Wage & Hour Employment Practices Litig.*, MDL 1735, 2010  
 15 WL 786513 (D. Nev. Mar. 8, 2010) (requiring \$500,000 bond "through attorneys").

17       Objector Pederson's arguments that she will suffer irreparable injury and the bond will  
 18 damage the public interest are disingenuous and exaggerated. Objector's counsel file many  
 19 appeals on behalf of objectors each year, hoping to extract money from parties. Dkts. 57 and 62  
 20 (attaching charts of counsel's numerous appeals). Given this apparently lucrative practice,  
 21 previous bonds many times the size of the bond here have not chilled their behavior. And if  
 22 Objector's counsel truly believes in the merits of their appeal, they know they will get the money  
 23 back because they will be the prevailing party on appeal.

### III. CONCLUSION

For the reasons stated above, the request to stay the appeal bond should be denied.

DATED this 20th day of August, 2012.

<p><b>KELLER ROHRBACK L.L.P.</b></p> <p>By <u>s/ Gretchen Freeman Cappio</u>  Lynn Lincoln Sarko, WSBA #16569  Gretchen Freeman Cappio, WSBA #29576  Harry Williams IV, WSBA #41020  Laura Gerber, WSBA #34981  <b>KELLER ROHRBACK, LLP</b>  1201 Third Avenue, Ste. 3200  Seattle, WA 98101  Telephone: (206) 623-1900  Facsimile: (206) 623-3384</p> <p>Sharon T. Hritz  <b>KELLER ROHRBACK, LLP</b>  1129 State Street, Ste. 8  Santa Barbara, CA 93101  Telephone: (805) 456-1496  Facsimile: (805) 456-1497</p> <p><b>FINKELSTEIN THOMPSON LLP</b></p> <p>Mila F. Bartos  Robert O. Wilson  Eugene J. Benick  <b>FINKELSTEIN THOMPSON LLP</b>  James Place  1077 30th Street NW, Ste. 150  Washington, DC 20007  Telephone: (202) 337-8000  Facsimile: (202) 337 8090</p> <p><i>Attorneys for Plaintiffs</i></p>	<p><b>SHOOK, HARDY &amp; BACON, LLP</b></p> <p>By <u>/s/ John K. Sherk (per authorization)</u>  John K. Sherk, III  Holly P. Smith  2555 Grand Blvd.  Kansas City, MO 64108-2613  Telephone: (816) 474-6550  Facsimile: (816) 421-5547</p> <p><b>WILSON SMITH COCHRAN DICKERSON</b></p> <p>Kathy A. Cochran, WSBA# 5775  901 Fifth Avenue, Ste. 1700  Seattle, WA 98164-2050  Telephone: (206) 623-4100  Facsimile: (206) 623-9273</p> <p><i>Attorneys for Defendant</i></p>
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1                   **CERTIFICATE OF SERVICE**

2                   I certify that on August 20, 2012, I electronically filed the foregoing with the Clerk of the  
3 Court using the CM/ECF system which will send notification of such filing to all counsel of  
record.

4                   DATED this 20th day of August, 2012.

5                   KELLER ROHRBACK L.L.P.

6                   By /s/ Gretchen Freeman Cappio

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